NOH HYOUNG SEOK

v.

PERWIRA AFFIN BANK BHD

COURT OF APPEAL, KUALA LUMPUR
NIK HASHIM JCA
AUGUSTINE PAUL JCA
ZAINUN ALI J
[CIVIL APPEAL NO: B-02-11-1105-01]
10 DECEMBER 2003

CIVIL PROCEDURE: *Summary judgment - Appeal against - Issue not raised by defendant in statement of defence or affidavit - Whether issue could be raised for first time by defendant before judge-in-chambers - Whether judge-in-chambers should have addressed issue in considering plaintiff's application for summary judgment - Showing cause against plaintiff's application by way of 'affidavit or otherwise' - Rules of the High Court 1980, O. 14 r. 4(1) - Interest rates and discharge of guarantees - Whether viva voce evidence required to determine question of fact - Function of trial judge in an Order 14 application*

CIVIL PROCEDURE: *Pleadings - Defence - Issue not raised by defendant in statement of defence or affidavit - Whether issue could be raised for the first time by defendant before judge-in-chambers - Whether judge-in-chambers should have addressed issue in considering plaintiff's application for summary judgment - Interest rates and discharge of guarantees - Showing cause against plaintiff's application by way of 'affidavit or otherwise' - Rules of the High Court 1980, O. 14 r. 4(1)*

This was an appeal by the 4th defendant from the decision of the judge-in-chambers allowing the plaintiff/bank to enter summary judgment against all the four defendants. The 4th defendant had earlier guaranteed the repayment of several loans granted by the plaintiff to the 1st defendant company when he was a director therein. The 4th defendant's grounds of appeal against the grant of the summary judgment were, *inter alia*, that: (i) he had been released from the guarantee; and/or (ii) the interest rates claimed by the plaintiff were illegal.

Held (allowing the appeal)
Per Zainun Ali J delivering the judgment of the court

[1] The finding of the judge-in-chambers that the 4th defendant had never secured a release from the guarantee from the plaintiff was erroneous on two counts. First, he had misinterpreted the general principles concerning the discharge of guarantees. It is trite that the discharge of a guarantee may be made orally and without consideration. Second, the issue whether the 4th defendant had been discharged from the guarantee was a question of fact; there was, thus, a conflict of evidence, and *viva voce* testimony in a trial would be necessary. Summary judgment should **not** have been given. (p 70 c-g)

[2] In promptly finding for the plaintiff, the judge-in-chambers had refused (and thus failed) to address the issue concerning 'penalty interest' as raised by the 4th defendant. It was indeed open to the 4th defendant to raise the said issue; he was, under O. 14 r. 4(1) Rules of the High Court 1980 ('RHC'), entitled to 'show cause against an application under r. 1 by affidavit or **otherwise** to the satisfaction of the court'. A defendant is entitled to show, over and above what has been pleaded in his statement of defence, that he has other defences. Indeed, he need only satisfy the court that 'there are circumstances that ought to be inquired into'. (pp 72 a, h, 73 a-d, f-h, 74 a, c-g)

[3] It is **not** the function of a trial judge in an O. 14 application to delve into the merits of the action and decide whether the defendant is likely to succeed or fail. He is merely to scrutinise the defences raised and test them against O. 14 r. 4(1) RHC to determine whether they come up to scratch as plausible defences. (pp 74 h & 75 a-b)

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan defendan keempat terhadap keputusan hakim-dalam-kamar yang membenarkan plaintif/bank memasukkan penghakiman terus terhadap keempat-empat defendan. Defendan keempat sebelumnya telah menggerenti pembayaran balik beberapa pinjaman yang diberikan plaintif kepada syarikat defendan pertama sewaktu beliau menjadi pengarahnya. Alasan-alasan rayuan defendan keempat terhadap pemberian penghakiman terus adalah, antara lain, bahawa: (i) beliau telah pun dibebaskan dari jaminan; dan/atau (ii) kadar faedah yang dituntut oleh plaintif adalah tak sah.

Diputuskan (membenarkan rayuan)
Oleh Zainun Ali H menyampaikan penghakiman mahkamah

[1] Dapatan hakim-dalam-kamar bahawa defendan keempat tidak pernah memperoleh pelepasan jaminan dari plaintif silap berdasarkan dua sebab. Pertama, beliau telah menyalahtafsir prinsip-prinsip am mengenai pelepasan jaminan. Ianya sesuatu yang biasa bahawa pelepasan jaminan boleh dibuat secara lisan dan tanpa balasan. Kedua, isu sama ada defendan keempat telah dilepaskan dari jaminan adalah satu persoalan fakta; oleh itu, wujud percanggahan keterangan, dan keterangan viva voce dalam satu perbicaraan adalah perlu. Penghakiman terus tidak harus diberikan.

[2] Dalam membuat keputusan untuk plaintif dengan begitu cepat, hakim-dalam kamar telah enggan (dan kerana itu gagal) memberi tumpuan kepada isu mengenai 'penalti faedah' seperti yang dibangkitkan oleh defendan keempat. Ianya adalah terbuka bagi defendan keempat untuk membangkitkan isu berkenaan; beliau adalah, di bawah A. 14 k. 4(1) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'), berhak untuk 'menunjuk sebab terhadap suatu permohonan di bawah kaedah 1 melalui afidavit atau sebaliknya yang memuaskan hati mahkamah'. Seseorang defendan berhak untuk menunjukkan, selain dari apa yang diplid dalam pernyataan pembelaan, bahawa ia juga mempunyai pembelaan-pembelaan lain. Malah, beliau hanya perlu menyakinkan mahkamah bahawa 'terdapat halkeadaan yang harus dan patut diselidiki'.

[3] Ianya bukanlah tugas hakim bicara dalam satu permohonan A. 14 untuk menyelidiki merit tindakan dan memutuskan sama ada defendan berkemungkinan akan berjaya atau gagal. Beliau hanya perlu meneliti pembelaan yang dibangkitkan dan mengujinya di sisi A. 14 k. 4(1) KMT bagi menentukan sama ada pembelaan tersebut merupakan pembelaan yang munasabah.

Case(s) referred to:

Alliance (Malaya) Engineering Co Sdn Bhd v. San Development Sdn Bhd [1974] 2 MLJ 94 ***(refd)***

Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(foll)***

Banque de Paris v. de Naray [1984] 1 Lloyas Rep 23 ***(refd)***

Burnes v. Trade Credits Ltd [1981] 2 All ER 122 ***(refd)***

D & C Bank v. Pembangunan Rumah Patani Sdn Bhd [1989] 2 CLJ 823; [1989] 1 CLJ 495 HC ***(refd)***

Gissco Sdn Bhd v. Blackgold Sdn Bhd [1988] 2 MLJ 397 ***(refd)***

Lin Securities (Pte) v. Noone & Co Sdn Bhd [1989] 1 MLJ 321 ***(foll)***

Penang Port Commission v. Kanawagi Subramaniam [1998] 4 CLJ 8 CA ***(refd)***
Ray v. Newton [1913] 1 KB 249 ***(refd)***
Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v. Ghazali Ibrahim [1985] 2 MLJ 225 ***(refd)***
Syn Lee & Co Ltd v. Bank of China [1961] MLJ 87 ***(refd)***
Tan Ah Tong v. Perwira Habib Bank (M) Sdn Bhd [1998] 3 CLJ 833 CA ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14 r. 4(1)

For the appellant - RR Sethu
For the respondent - Chan Kok Keong

[Appeal from High Court, Shah Alam; Civil Suit No: MTI-22-606-1998

Reported by Gan Peng Chiang

JUDGMENT

Zainun Ali J:
This is the 4th defendant's appeal against the decision of the learned judge made on 29 September 1999 whereby judgment under O. 14 was entered against the four defendants including the 4th defendant on the plaintiff's application (encl. 21).

In this appeal, having heard the submissions of both learned counsel for the appellant and the respondent and after having deliberated the matter, we came to a unanimous decision that the appeal has merits and accordingly we allowed the appeal. We now give our reasons.

As a prelude, whilst it is true that a slew of authorities on an O. 14 application has already filled the law reports, we are of the view that the implications of the issues raised may often be obscured at the expense of illuminating the significance of this summary power.

The Facts
The appellant was a former director and shareholder of one HIL Electronics Sdn Bhd ("the company"). Both the 2nd and 3rd defendants were also directors of the company.

The company had borrowed funds from the respondent amounting RM11,250,000 and the commercial credit facility was RM3,000,000.

The appellant sold all his shares in the company to the 3rd defendant in July 1997 and then left the company.

Subsequently, the 3rd and 2nd defendants sold their shares to MOCCIS Trading Sdn Bhd, which later changed its name to MOCCIS Electronics Sdn Bhd (the 1st defendant).

Meanwhile the respondent continued the facilities already provided to the company.

The 2nd to 4th defendants are guarantors of the loans granted by the respondent to the company.

The written guarantees by the 3rd and 4th defendants were dated 10 December 1990, 11 September 1992 and 17 May 1995. It is the respondent's case that the 2nd to 4th defendants guaranteed not merely as sureties but also as principal debtors, where the consideration sets out the payment on demand of all monies due and owing by the 1st defendant to the respondent including interest therein.

When the 1st defendant defaulted in making payments on the due dates to the respondent despite demands, the respondent recalled the facilities and notified the 1st defendant of the revision of the interest rates on each of the outstanding facilities to 4% above the respondent's base lending rate per annum.

The respondent through its solicitor issued letters of demand dated 23 January 1998 to the 1st defendant and dated 5 March 1998 to the 2nd to 4th defendants demanding from each of the defendants payments of all sums due and owing to the respondent.

In the intervening period, there was a change in the shareholding structure of the 1st defendant. The facilities were allegedly given to the 1st defendant before the change in the shareholding.

It is the appellant's case that he was not involved in the financial side of the operation of the 1st defendant before the change, and that it was the 3rd defendant who was responsible for the financial affairs of the 1st defendant.

The present proceeding was instituted by the respondent, suing the 1st defendant for sums allegedly due from the 1st defendant as the principal debtor and against the 2nd, 3rd and 4th defendants as guarantors.

From the cause papers, it is seen that the respondent's submission in relation to the 2nd, 3rd and 4th defendants draws no distinction as to the alleged liability of each of the defendants. The respondent proceeds as if all the three defendants are jointly and severally liable on the various guarantees relied on.

It is the appellant's case that for the reasons advanced below, his case has to be treated separately from that of the 2nd and 3rd defendants.

The present appeal is therefore solely by the 4th defendant against the decision of the judge in chambers delivered on 29 October 2001.

In dismissing the appeal, the judge had, in our view, misinterpreted the platform of an O. 14 application, as his main concern should be to see whether there are *bona fide* triable issues and not decide the application on the spot, especially when facts are in issue.

The Grounds Of Appeal

As amplified by the appellant, there are four grounds of appeal, which the appellant submits, entitles him to be allowed unconditional leave to defend.

The grounds relate to:

(i) Notice of demand

(ii) Release of guarantee

(iii) Breach by plaintiff and effect

(iv) Interest rates

1. Notice Of Demand

This first ground of appeal, which refers to the validity of the notice of demand is a common issue which often resurfaces due to its significance in establishing a cause of action. We allowed submissions by both parties but made no ruling on this specific ground of appeal, since it is the fourth ground of appeal which arrests this court's attention in as much as giving this court material upon which to deliberate.

2. Release Of Guarantee

With respect to the appellant's second ground of appeal, a flurry of letters had passed between the appellant and the respondent and its officers. Of significance is the letter of exh. NHS2 which was sent by the appellant stating that two credit officers (one Ms Lim and Encik Zulkifli) had verbally confirmed that the appellant was released from his liability as guarantor.

The respondent however, chose not to reply to NHS2 and gave no explanation for its failure to do so. In the meantime, the appellant wrote to the respondent requesting release as guarantor.

However, the learned judge found the appellant's request for his withdrawal as a guarantor mystifying, since the learned judge said that it was pointless to seek the request if he had already been released earlier, as alleged by him.

Given that the respondent's deponent, one Mahmud bin Bidin had denied that neither he, nor one Tan Kwee Hee had "at anytime acknowledged or agreed to release the appellant," a response by the respondent to NHS2 may well support the appellant's version that there was in fact a release.

To all these, the learned judge merely observed that:

> The fourth defendant's contention is inherently improbable and contradicts his own letter of 13 November 1997 (Ex NHS-2 of Encl. 22). I therefore rejected the claim of the fourth defendant that he was released as a guarantor by the plaintiff.

We find that the learned judge had fallen into error here. Clearly there is a conflict of evidence in this regard, as a release can be oral. It is also a finding of fact, where consideration is not necessary. See *Tan Ah Tong v. Perwira Habib Bank (M) Sdn Bhd* [1998] 3 MLJ 778, where the court ruled that:

> It is manifest that the discharge may even be oral or be effective as a waiver or as an estoppel. Therefore the contention of the respondent bank that the discharge of a guarantee in order to be binding must be supported by consideration cannot, with respect, be accepted.

In view of the respondent's 3rd affidavit which merely states that the respondent did not agree to release the appellant, and in the absence of a supporting letter which rejects the request we find that this omission does not square with what Mr Tan Kwe Hee had apparently told the appellant.

Thus, the judge's finding, in the light of an O. 14 application, is manifestly erroneous, since a dispute as to an issue of fact, namely, whether there was a release, amounts to a conflict of evidence which requires *viva voce* evidence in a trial. In making such a finding of fact on a conflict of evidence, we find that the learned judge had misinterpreted the principles of release as well as the limitation and parameters of an O. 14 application, which we will deal with later.

3. Breach By Plaintiff And Effect

The appellant's third ground of appeal rests on the premise that since he had left the company in June 1997 he is absolved from liability even if there was a breach to the agreement as alleged by respondent. Regard might be had to cl. II of the agreement which explains the status of the guarantor in the event of a change in the constitution of the borrowers.

The learned judge ruled that:

> ... There has been no breach by the plaintiff of the provision of debenture, as alleged by the fourth defendant. Being a bank, the plaintiff does not have the necessary control over the first defendant's shareholding. As a result of the plaintiff not being able to exercise such control, it is the 1st defendant who instead agrees and undertakes not to cause any change in its equity or composition. Therefore if such an event occurs, it is the 1st defendant that is in breach of the various agreements with the plaintiff and not the plaintiff.

However, it is the respondent's contention that the change in shareholding does not affect the appellant's liability as guarantor.

Be that as it may, we find that at this point, it is unnecessary for us to consider whether the agreement had been terminated or not. We are only concerned with the learned judge's failure to consider the points raised at this stage for the reasons given by him.

Interest Rates

The fourth ground of appeal bears upon the question of the respondent's variation of the interest rates in which the appellant disputes the alleged notices of variation.

The respondent made claims for interest at several different rates above the base lending rates and the legality of these claims were vigorously challenged by the appellant. As could be extracted from the records, the principal loan documents set out the interest rate at 1% and 2% above the Base Lending Rate (B.L.R.) and the said documents also provide for the increase in rates and for penalty interests and damages etc.

It is the appellant's case that the respondent bears the onus of proving that the interest rates claimed are proper and legal.

In challenging the validity of the penalty interest the appellant *inter alia,* subscribed to the authority found in *D & C Bank v. Pembangunan Rumah Pantai Sdn Bhd* [1989] 2 CLJ 823 which insisted on the defendant being given a written notice of such amendment (when imposing additional terms and conditions).

The appellant also relied on *Burnes v. Trade Credits Ltd* [1981] 2 All ER 122, which held that the unauthorised variation of the interest rate would also operate to discharge the guarantor.

We find that the learned judge failed to address the issue of penalty interest in relation to the defence put up by 4th defendant and instead his Lordship observed starkly, that:

> This is the first time the fourth defendant is **raising this issue which was not raised in his statement of defence or in his affidavit**. I therefore rejected this argument. (emphasis added).

By the said ruling above, the learned judge is effectively saying that the appellant, by having failed to raise the issue (of penalty interest) in his defence or in his affidavit, is thus precluded from so raising it now, or ever.

The question is: What is the legal position on this point?

For a start, we would say that the effect of an O. 14 proceeding has been pronounced time and again, bearing in mind the special nature of this jurisdiction. In a dissenting judgment, Gan Chit Tuan J (as he then was) in *Bank Negara Malaysia v. Mohd Ismail and Ors* [1992] 1 MLJ 400 admirably captured the essence of an O. 14 proceeding thus:

> ... The scope of Order 14 proceedings meant for cases which are virtually uncontested or uncontestable is now determined by the Rules of the High Court 1980. Generally where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a *bona fide* defence, he ought to have leave to defend.

Then again, in the words of Thomson CJ in *Syn Lee & Co Ltd v. Bank of China* [1961] MLJ 87:

> ... there may have been some slight misapprehension on the part of ... the trial judge as to the proper approach. ... we have to remember that the Order is there as much in the interests of the defendants as in the interests of the plaintiffs. It is in the interest of plaintiffs that they should be able to get prompt judgment when there is no real defence. But on the other hand it is in the interest of defendants in such cases that plaintiffs should be able to get judgments not only expeditiously but economically.

This view is fortified by later cases such as that of *Lin Securities (Pte) v. Noone & Co Sdn. Bhd.* [1989] 1 MLJ 321, where the court observed that:

> ... the issue at an Order 14 application is whether the defendant has a defence and not whether the statement of defence provides him with a defence.

In the instant case, at the stage when the appellant argued and challenged the validity of the penalty interest, no defence had been filed. However as case laws would have shown, it is open to the appellant to raise this issue, based as it were, on the respondent's own documents filed in court.

Moreover the appellant, in an O. 14 application can seek leave to defend by "affidavit or otherwise" (O. 14 r. 4(1)).

Order 14 r. 4(1) reads: Leave to defend (O. 14 r. 4)

> (1) Defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the court.

Rule 4(1) of O. 14 provides for a situation where, once the plaintiff has made out a *prima facie* case, the onus shifts to the defendant to show cause why judgment should not be entered against him "by affidavit or otherwise."

In the instant case, the appellant raised the issue of the validity of the penalty interest as he gleaned them from the respondent's own documents filed in court.

In the context of r. 4 O. 14, the court will not decide the O. 14 application by weighing both the plaintiff's and defendant's affidavit but must look at the matter in its entirety to "ascertain whether the defendant has a real or bona fide defence.

Just suppose the defendant's assertion in the affidavit is not credible, there is no fair or reasonable probability of the defendant having a defence. See *Banque de Paris v. de Naray* [1984] 1 Lloyas Rep 23 and *Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v. Ghazali bin Ibrahim* [1985] 2 MLJ 225 where from the facts and circumstances of the case as a whole, the defendant had failed to show a *bona fide* defence to the claim.

Rule 4 O. 14 envisages a situation where a defendant may show cause "otherwise" by a preliminary objection, for example, that the case is not within the order or that the statement of claim or the affidavit is defective. Such an objection is not required to be supported by an affidavit.

The defendant may also show cause by serving a full and *bona fide* defence setting out triable issues before the issue of the summons: see Gill CJ's observation in *Alliance (Malaya) Engineering Co. Sdn. Bhd. v. San Development Sdn. Bhd.* [1974] 2 MLJ 94.

Likewise, a defendant's failure to file an affidavit in opposition does not preclude the court from considering the defence as a mode of opposition to the plaintiff's application (see *Gissco Sdn. Bhd. v. Blackgold Sdn Bhd* [1988] 2 MLJ 397.

In keeping with the exacting standards to be observed before such summary powers can be invoked in an O. 14 application, the defendant is entitled to show, over and above what has been pleaded in the statement of defence that he has other defences.

In *Lin Securities (Pte) Ltd v. Noone & Co Sdn Bhd (Klang Jaya Bahru Development Bhd* [1989] 1 MLJ 321, the defendants sought to rely on the ground that the contract in question was governed by Singapore law, which was not pleaded in the statement of defence. The court held that the point raised amounted to a question of law and the matter could not be disposed off summarily. The defendant was duly given unconditional leave to defend.

In another case, *Ray v. Newton* [1913] 1 KB 249, the defendant's affidavit was not conclusive and the defendant was not prevented from relying on defences not raised in the affidavit.

Thus in an application such as this, it is certainly open to the defendant to raise his defence even in the absence of a statement of defence and affidavit filed, and this is especially compelling when it is a question of law. In this case such a question of law was discernible from the respondent's own documents.

Under this rule (r. 4 O. 14) even if the defendant cannot point to a specific issue which ought to be tried, but the defendant nevertheless satisfies the court that there are circumstances that ought to be inquired into, then the words "affidavit evidence or otherwise" in this rule would serve this purpose.

We might mention here that counsel for the respondent cited *Penang Port Commission v. Kanagawi s/o Subramaniam* [1998] 3 AMR 277, and argued that in an O. 14 proceeding, the appellant may show triable issues by "affidavit evidence or otherwise" only in matters raised in his defence and is precluded from raising it outside of this parameter, for it would then amount to giving evidence from the bar.

We read the said authority cited, but were unable to find anywhere in the judgment of the learned judge such a ruling by him. Thus, we find that respondent counsel's submission above unsustainable.

For completeness, it is also not the function of the trial judge in an O. 14 application to delve into the merits of the case and decide whether the defendant is likely to succeed or fail.

His is merely to scrutinise the defences of the defendant and test them *inter alia*, against the language of r. 4 O. 14 to determine whether they come up to scratch, as a plausible defence. He must also bear in mind the cautionary words of Thomson CJ, in *Syn Lee & Co. Ltd v. Bank of China* [1961] 1 MLJ 87, which place importance on the ruling that as long as the defendant raises even one issue for trial, the plaintiff's application will necessarily disintegrate.

Thus it bears emphasis here that the language of r. 4 O. 14 is unequivocal in its imperative that the defendant is able to raise issues as defences even in the absence of a statement of defence or affidavit filed.

For the reasons above, we allowed this appeal and order that the appellant be refunded his deposit.